IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-6431

ABDIEL CABAN,

Appellant,

-against-

KAZIM MOHAMMED AND MARIA MOHAMMED,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE LEGAL AID SOCIETY OF NEW YORK CITY.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANT, AND STATEMENT OF INTEREST OF THE AMICUS

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The Legal Aid Society of New York City respectfully moves this Court, pursuant to Rule 42 of the Rules of the Supreme Court, for permission to file the attached brief amicus curiae in support of the appellant, Abdiel Caban, by reason of the amicus' substantial interest in the outcome of this case and its considerable experience in litigation concerning the constitutional issues presented herein.

1. Movant The Legal Aid Society is a private, not-for-profit organization incorporated under the laws of the State of New York for the purpose of rendering legal representation and assistance to persons in New York City whoare without adequate means to employ other counsel.

2. This appeal presents a constitutional question of far-reaching and fundamental importance to large numbers

of the indigent persons in New York City whom it is the Society's purpose to serve, namely the question of the constitutional right of an unwed father, absent a showing of abandonment or unfitness, to prevent the adoption of his child, and thereby to receive the same protection in regard to his fundamental interest in his child that is accorded to all other parents in New York State.

3. The client population of the Civil Division of The Legal Aid Society includes substantial numbers of persons who have illegitimate offspring, and the constitutional question involved in this case is of great importance to those unwed fathers and their children whose relationships and legal status as parent and child may be permanently terminated by adoption, over their objections, without a showing of abandonment or unfitness of the parent, solely

because the child was born out of wedlock and the parent is a male. As lawyers for the City's poor, The Legal Aid Society has long concerned itself with advancing, in every appropriate forum, the legal rights of its clients. The Society's lawyers have considerable experience with the kinds of constitutional issues presented here, and specifically, substantial knowledge and experience concerning the nature and consequences of familial relationships involving out-of-wedlock children, as well as with the operation of those statutes governing child custody, termination of parental rights and adoption in the State of New York.

4. The constitutional question raised by the instant appeal, concerning the rights of unwed fathers who have borne significant and direct responsibility for the custody and supervision

of their children to prevent their adoption in the same manner as other natural parents, is one of vital concern to The Legal Aid Society in its efforts to assist fully in litigation of issues that affect the poor. Attorneys from The Legal Aid Society have represented unwed fathers before this Court in Fiallo v. Bell, 430 U.S. 787 (1977) and as amicus curiae in Matter of Lalli v. Lalli, No. 77-1115, probable jurisdiction noted, March 20, 1978.

5. Movants thus have an obvious and immediate interest in the issue before this Court on appeal. Counsel for appellant has consented to the filing of this brief amicus curiae. This motion is filed because the Attorney State General of New York has refused consent.

WHEREFORE, movant prays that the attached brief amicus curiae be permitted to be filed with the Court.

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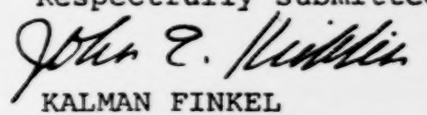
Dated: New York, New York
June 27, 1978

Respectfully submitted,



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STATEMENT OF THE CASE

This case concerns the constitutionality, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, of New York Domestic Relations Law (DRL) § 111 as applied to authorize the adoption of children born out of wedlock over the objections of their father with whom they have lived and/or maintained regular contact throughout their lives, without a prior determination that the father has abandoned them or is unfit as a parent, solely because the father has not been married to the children's mother. More specifically, the question presented here is whether the State of New York may constitutionally deny the appellant natural father the right to prevent the adoption of his children by their step-father, in the absence of proof of parental unfitness or abandonment, when such a right is afforded to all other parents, including unmarried mothers and divorced or separated fathers.

The Challenged Statute

At issue on this appeal is the constitutionality of DRL § 111, which sets forth requirements for obtaining consent of certain parties before the adoption of a minor child may take place, and which permits the waiver of such consent in a number of different circumstances. It is necessary, under New York law, to obtain the consent to an adoption of the child, if over age 14; of the parents of a child born in wedlock; or the mother of a child born out of wedlock. DRL § 111 (1)(a)-(d).[1] Consent of the parents

1. Formerly DRL § 111(a)-(4), renumbered by Laws of 1976, Chapter 666, effective January 1, 1977.

is not required for the adoption of an adult over the age of 18 and the consent of the legal custodian of a child, other than a parent, can be dispensed with if the court finds that to do so is in the best interests of the child. DRL § 111 (4).[2] But if either parent of a legitimate child, or the mother of an out of wedlock child, refuses to consent, the child cannot be adopted unless the objecting parent has forfeited the right to withhold consent by abandoning the child, or by manifesting unfitness in one of the forms explicitly designated by statute.

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2. The substance of these provisions waiving consent in certain instances was formerly contained in unnumbered paragraphs following DRL § 111(4). The former version of the statute, which was in effect at the time of the trial in the case at bar, is set out at page 4 of Appellant's Jurisdictional Statement.

Only the unwed father's parental rights may be terminated and his children adopted over his objections without a showing of abandonment or unfitness. Pursuant to DRL § 111-a, he is entitled to notice of a proposed adoption, and to be heard on the issue of whether the adoption will be in the child's "best interest." But he has no right to veto the adoption; the extent of his past involvement with the child and his current fitness as a parent are relevant only insofar as they affect the court's determination of the best interest of the child.[3]

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3. Parental consent to an adoption has been a requisite in all versions of the statute since its inception. See, L. 1873, c. 830; L. 1896, c. 272; L. 1909, c. 19; L. 1938, c. 606. The consent of an unwed father has never been required. Notice of adoption proceedings and the right to an opportunity to be heard on the best interests of the child were first expressly granted to unwed fathers in an attempt to comply with this Court's decision in Stanley v. Illinois, 405 U.S. 645 (1972). L. 1976,

(footnote continued on next page)

Statement of Facts

Certain key facts not in dispute are critical to resolution of the legal issues presented on this appeal, and they are briefly summarized here. Appellant Abdiel Caban lived with appellee Maria Mohammed in New York City for 5 years, commencing in 1968. They conducted themselves and held themselves out to the community as husband and wife. Two children were born to the couple: David, born in 1969, and Denise, born in 1971. Mr. Caban has at all times freely and fully acknowledged paternity of both children. His name appears on their birth certificates and they have been known by his surname. During the years the family lived together as a unit, the parents shared financial and other respo sibilities for the children's care and

c. 665, effective January 1, 1977. See also, McKinney's 1976 Sessions Laws, vol. 2 p. 2442. The relevant provision, as currently in effect, is set forth in the appendix to this brief.

well-being. When Maria left Mr. Caban to live with and marry appellee Kazim Mohammed,[4] she took the children to live with her, but they continued to see their father each weekend. After a period of six to nine months, the children were abruptly sent by their mother to live in Puerto Rico, with their maternal grandmother. During the fourteen months the children remained in Puerto Rico, Mr. Caban was kept regularly informed of their health and development through his father, the children's grandfather, who lived nearby in Puerto Rico and regularly visited with his grandchildren. In November, 1975, Mr. Caban went to Puerto Rico and brought the children back to New York to

4. The precise date on which appellee Maria Mohammed ceased living with appellant is in dispute.

live with him and his new wife, Nina, and her two children from a previous marriage. As the family was now too large for the Caban's apartment, Mr. and Mrs. Caban began looking for and eventually purchased a 4-bedroom home in Brooklyn where all the children could live comfortably. Shortly thereafter, Maria Mohammed commenced a proceeding to obtain custody of the children in Kings County Family Court. A temporary custody order was entered in favor of the children's mother, pending a full trial on the merits. Visitation was granted to Mr. Caban, who continued to see the children regularly, until the Orders of Adoption were entered by the trial court below.

But the custody trial in Family Court was never held, because appellees petitioned the Kings County Surrogate's Court, pursuant to DRL Article 7, to

adopt the children. Mr. Caban appeared in the Surrogate's Court proceeding, objected to the adoptions and, together with his wife, cross-petitioned for adoption of both children. At trial, Mr. Caban maintained that in light of this Court's holding in Stanley v. Illinois, 405 U.S. 645 (1972), David and Denise could not be adopted without his consent or a showing of his parental unfitness or abandonment. The trial court rejected these contentions and specifically held that Mr. Caban was entitled to a hearing only on the issue of whether the proposed adoptions of his children by their mother and step-father were in their best interests:

> ... the putative father's consent to such an adoption is not a legal necessity ... The prime objective of allowing a putative father to be heard is therefore not to determine the degree of his interest in the child but rather

> to determine the best interests of the child. Any evidence the putative father may offer concerning the solidity of the marriage and the concern and treatment of the child in the new family is particularly relevant.

Unreported Opinion, Surrogate's Court Kings County, Appellant's Appendix at pp. 27-28. (emphasis added).

Following the trial, appellees' petition for adoption were granted, thereby severing all parental ties between Mr. Caban and his children, and supplanting him as their father with their step-father, appellee Kazim Mohammed. See Surrogate's Court Opinion, supra, at p. 30. The cross-petitions for adoption brought by Mr. Caban and his wife were summarily denied, since the mother of the children refused to consent, as required by DRL § 111(3). Surrogate's Court Opinion, supra at p. 27.

The Appellate Division, Second Department, and the Court of Appeals of the State of New York each in turn dismissed appeals from the Surrogate's Court orders approving the adoptions of David and Denise Caban by their mother and step-father, for lack of a substantial constitutional question, on the authority of this Court's dismissal of the appeal in Matter of Malpica-Orsini, 36 N.Y.2d 568 (1975), app. dismissed, sub nom, Orsini v. Blasi, 423 U.S. 1042 (1976). Matter of David Andrew C., 56 A.D.2d 627 (2d Dept. 1977); Matter of David A.C., 43 N.Y.2d 708 (1977). Motions for rehearing and reargument before the New York Court of Appeals in light of this Court's subsequent decision in Quilloin v. Walcott, ___ U.S. ___, 54 L.Ed.2d 511 (1978) were denied, and this appeal followed.

By this amicus curiae brief submitted in support of the appellant Abdiel Caban,

The Legal Aid Society of New York City sets forth its argument as to why this Court should invalidate New York's adoption statute insofar as it is applied to deny unmarried fathers with close family ties to their children the same protections against unwarranted termination of their fundamental parental rights as are afforded to all other parent in this state.

INTRODUCTION AND SUMMARY OF ARGUMENT

By denying fit unwed fathers the same right to block non-consensual adoptio of their children afforded to all other parents, DRL § 111 violates the natural parent's constitutionally protected right to family integrity under the Due Process Clause, and discriminates against him on the basis of sex and marital status, in contravention of the Equal Protection Clau Adoption effects the complete, permanent

severance of all familial ties between parent and child; only in the case of unmarried fathers is this severance permitted to occur over the parent's objections, and in the absence of any showing of abandonment or unfitness to perform parental responsibilities. Thus, in the instant case, the unwed father's substantial, ongoing relationship with his children was intruded upon and terminated without affording him the protections which due process requires. Moreover, these harsh and extreme consequences were imposed upon him solely because of his sex and marital status, despite the absence of any demonstrable nexus between either factor and the nature of the parent-child relationship severed by adoption.

The gravity and purposelessness of the discrimination worked by the challenged statute can be fully appreciated only when viewed within the context of the overall

legislative scheme governing child care[5] in New York State. When the challenged provision is evaluated against the backdrop of the entire New York system it becomes readily apparent that the invalidation of the discrimination against unwed fathers contained in DRL § 111 will guarantee all constitutionally protected interests full recognition, and that, at the same time, the underlying purposes of the New York child care system will be given effect. The statutory scheme governing child custody and care in New York State, when viewed in its entirety, contains ample protections for the best interests of the child, and there is no justification or purpose which is sufficiently weighty to

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5. The phrase "child care system" as used throughout this brief is intended as a convenient reference to that body of statutory law governing child custody, visitation, support and adoption in New York State. Other aspects of the child care statutes, e.g., those dealing with foster care, day care, child protection, are not relevant to the issue on appeal, and are not encompassed by the phrase as used herein.

counterbalance the statute's violation of the fundamental constitutional rights of the unmarried father in his relationship to his children.

From the point of view of the unwed father, the consequences of the adoption of his children by a stranger are significant, drastic and irrevocable. In comparison, the salutory effect upon the children of adoption by the family which has their custody is not nearly as substantial. Moreover, the rights of the natural mother to the continued care and custody of her children are not threatened or disturbed by the preservation of the father's parental rights, nor would the natural father's successful veto of the adoption permit his securing of custody or visitation when such would not serve the best interests of the children. Finally, the provisions of the statute which allow the waiver of consent to adoption of parents who have abandoned their

children or shown themselves to be unfit prevents any parent whose interests in his children are insubstantial from hindering their adoption.

It is in light of these basic characteristics of the statutory framework, as described more fully in subsection (2) below, that the constitutionality of denying a natural father like Mr. Caban, on the facts and circumstances of his case, the right afforded to all other parents to block a non-consensual adoption must ultimately be measured, and it is clear that the challenged provisions are unconstitutional as applied to this case.

ARGUMENT

DOMESTIC RELATIONS LAW SECTION 111 IS UNCONSTITUTIONAL AS APPLIED TO DENY UNWED FATHERS THE SAME RIGHT TO PREVENT THE ADOPTION OF THEIR CHILDREN AFFORDED TO ALL OTHER PARENTS, ESPECIALLY IN LIGHT OF OTHER FEATURES OF THE NEW YORK STATUTORY SYSTEM WHICH ASSURE THAT, IN ALL DETERMINATIONS INVOLVING THE CHILD'S WELFARE, HIS/HER BEST INTEREST CONTROLS AND IN LIGHT OF THE ABSENCE OF ANY COUNTERVAILING INTEREST WHICH JUSTIFIES THE VIOLATION OF FUNDAMENTAL RIGHTS OF UNWED FATHERS.

1. Section 111 of New York's Domestic Relations Law Is Violative of the Basic Due Process and Equal Protection Rights of Unmarried Fathers.

The starting point of the constitutional analysis in this case is the bedrock principle, established beyond dispute by a long and unbroken line of this Court's decisions, that the privacy and integrity of the relationship between the natural parent and his/her child is a fundamental liberty interest

entitled to the utmost constitutional protection:

> The rights to conceive and to raise one's children have been deemed "essential," Meyer v. Nebraska, 262 U.S. 390, 399, 67 L.Ed. 1042, 1045, 43 S.Ct. 625, 29 ALR 1446 (1923), "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541, 86 L.Ed. 1665, 1660, 62 S.Ct. 1110 (1942), and "[r]ights far more precious ... than property rights," May v. Anderson, 345 U.S. 528, 533, 97 L.Ed. 1221, 1226, 73 S.Ct. 840 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince V. Massachusetts, 321 U.S. 158, 166, 88 L.Ed. 645, 652, 64 S.Ct. 438 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, supra, at 399, 67 L.Ed. 1045, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, at 541, 86 L.Ed. at 1660, and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496, 14 L.Ed.2d 510, 522, 85 S.Ct. 1678 (1965) (Goldberg, J., concurring).

Stanley v. Illinois, 405 U.S. 645, 651 (1972). In Stanley, this Court held that the right of a natural father, married or unmarried, to the care,

custody and companionship of his children is entitled to both procedural and substantive protection under the Due Process Clause of the Fourteenth Amendment, and that the state may not deprive him of his children without affording him notice and an opportunity to be heard, and without establishing that he is unfit to retain their custody. See also, Armstrong v. Manzo, 380 U.S. 545 (1965); Smith v. OFFER, 431 U.S. 816, 53 L.Ed.2d 14, 33-34 (1977); Moore v. East Cleveland, 431 U.S. 494, 52 L.Ed.2d 531, 537-538.

Stanley involved the issue of custody of children, but procedural and substantive guidelines at least as stringent as those articulated therein must be applied when the permanent severance of all connecting links between parent and child are at stake. See, Rothstein v. Lutheran Social Services, 405 US 1051 (1972); see

also, Alsager v. District Court of Polk County, 406 F.Supp. 10 (S.D. Iowa 1975), aff'd 545 F.2d 1137 (8th Cir. 1976) (termination of parental rights without showing of "actual or imminent harm to the children" in their natural home violated substantive due process); Roe v. Conn. 417 F.Supp. 769 (M.D. Ala. 1976) (the state's interest "would become compelling enough to sever entirely the parent-child relationship only when the child is subjected to real physical or emotional harm and less drastic measures would be unavailing").

While New York State has apparently acknowledged the fundamental nature of the interests at stake in an adoption proceeding with respect to most natural parents,[6] the unwed natural father is

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6. Amicus does not concede, but assumes arguendo, for purposes of this appeal, that the definitions of "abandonment" and other forms of "unfitness" contained in DRL § 111 and SSL § 384-b described infra at p. 40 are sufficiently precise and the

inexplicably relegated to an inferior status. The notice and hearing he is provided are virtually meaningless, since his right to a continued relationship with his children may be terminated regardless of the nature of his past or current involvement with them,[7] purely on the basis of the subjective determination of the children's best interest made by the individual judge,[8] and since an

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conduct prescribed therein sufficiently grave, to pass constitutional muster as grounds upon which to base the termination of parental rights.

7. In this case, appellant was actually spending every Sunday with his children until the week before the adoption order was entered.

8. "[J]udges ... may find it difficult, in utilizing vague standards like 'the best interests of the child,' to avoid decisions resting on subjective values." Smith v. OFFER, supra, 53 L.Ed.2d 14, 29 n. 36.

adoption may well be approved without an inquiry into the father's capabilities as a parent, much less a showing of his unfitness. Indeed, this is precisely how the statute operated in the instant case. While the new provisions requiring a hearing for unwed fathers were not in effect at the time of the trial, the Court below, consistent with the practice of other courts in the state at that time, did afford Mr. Caban an opportunity to be heard on the best interests of the children. However, in the trial court's view, a "best interests" hearing did not involve an examination of Mr. Caban's interest in and love for the children, nor his fitness and desire to continue his relationship with them, but rather, only a chance for Mr. Caban to provide any information he might have on the Mohammed's marriage and family life.

The failure of the New York statute to afford an unwed father the same right to block the adoption of his children available to all parents constitutes an extreme and unmitigated deprivation of his primary due process right to the preservation of the integrity of his familial relationships. Moreover, this disparate treatment of the unwed father's parental rights, vis-a-vis those of any other parent in the same factual context is indisputably an arbitrary and irrational discrimination based solely on sex and marital status which cannot pass constitutional muster under the equal protection analysis this Court has applied to gender or illegitimacy-based classifications.

This Court has been especially critical of statutory classifications based on gender or illegitimacy. In Trimble v. Gordon, 430 U.S. 762,

52 L.Ed.2d 31, (1977) an Illinois statute allowing illegitimate children to inherit by intestate succession only from their mothers was struck down on equal protection grounds. The Court concluded that statutory classifications based on illegitimacy must henceforth be "examined ... more critically" for the strength of their relationship to legitimate and actual state purposes," 52 L.Ed.2d at 37, 43 n. 17. The New York adoption statute, insofar as it affords a lesser degree of protection to familial relationships between all illegitimate children and their fathers than is extended to other parent-child relationships, cannot withstand such scrutiny. There is no nexus between the marital status of the parent and the gravity of the deprivation suffered by the family when it is dismembered by an adoption order. A statute which

presumes that all illegitimate children are in need of alternate fathers, simply because their mother consents, or has her own parental rights terminated, sweeps too broadly to satisfy the test in Trimble or this Court's previous decisions in this area.[9]

DRL § 111 also constitutes unconstitutional sex discrimination, since it irrationally discriminates to an extreme degree against fathers who are not married to their children's mother while affording unwed mothers the full panoply of procedural and substantive safeguards against unwarranted termination of their parental rights. There is no principled distinction between the interests of unmarried mothers and of unmarried fathers in the integrity

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9 See, e.g., Jiminez v. Weinberger, 417 U.S. 628 (1974); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Casualty & Insurance Co., 406 U.S. 164 (1972).

and privacy of the family relationship, and the statute clearly must fall on this ground as well. The standard applicable to gender-based classifications was recently enunciated by this Court in Craig v. Boren, 429 U.S. 190, 50 L.Ed.2d 397, 407 (1977):

> To withstand constitutional challenge previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.

The unequal treatment of the parental rights of male and female parents in the adoption context cannot be shown to serve any important governmental objective; indeed, to the extent that it breaks up the bonds between fathers and their children, the statute contradicts the underlying goal of all New York's child care legislation, i.e. fostering positive relationships between children and their natural families.

Statutes embodying unjustified and outmoded stereotypes concerning the roles of men and women in child-rearing and family life have repeatedly been struck down by this Court[10] and the discrimination and illogic of the 'maternal preference' in child custody determinations has long been cast aside by New York law, which now view requests for custody by both parents on equal footing.[11] There is no reasoned basis for continuing to apply a maternal preference in the adoption context.

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10. Cf.: Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S.677 (1973).

11. See, e.g. Chavez v. Chavez, 53 AD 2d 593 (1st Dept. 1976); Hechemy v. Hechemy, 82 Misc.2d 79 (S.Ct., Albany Cty 1975); People ex rel Watts v. Watts, 77 Misc.2d 178 (Fam. Ct., NY Cty 1973); Stone v. Chip, 68 Misc.2d 134 (Fam. Ct., NY Cty. 1971).

2. The New York Statute's Anomalous Disregard of the Rights of Unmarried Fathers is Not Justified by Any Compelling Countervailing Interest.

The constitutional shortcomings of DRL § 111 are particularly intolerable because their harsh and unjust effects upon unwed fathers such as Mr. Caban and their children are not justified by any strong countervailing interest or policy. As will be demonstrated, the Caban children will gain little from an adoption, and the interest of the State as parens patriae in protecting their health and welfare is amply met by other statutory provisions which ensure that unwed fathers and other parents whose attachments to their children do not merit deference will be prevented from obstructing their children's growth and development. Thus, affording fit unwed fathers the opportunity to prevent their children's adoption will bring New York's adoption statute into con-

formity with basic constitutional principles of due process and equal protection without jeopardizing the strong and proper public policies which the New York child care system is designed to serve.

A. Adoption constitutes the permanent, final severance of the unwed father's familial ties with his children.

The permanent and harsh effect of adoption upon the unwed father's interest in his relationship to his own child cannot be overemphasized. An order of adoption, by definition, always involves complete replacement of a parent by a third party:

> Effect of Adoption. After the making of an order of adoption the natural parent of the adopted child shall be relieved of all parental duties toward and all responsibilities for and shall have no rights over such adopted child or to his property by descent or succession, except as hereinafter stated.
>
> The adoptive parents or parent and the adoptive child shall sustain toward each other the legal relation of parent and child and shall have all the rights and be

> subject to all the duties of that relation, including the rights of inheritance from and through each other and the natural and adopted kindred of the adoptive parents or parent. DRL § 117.

An adopted child is issued a new birth certificate, in which the name of the adoptive parent is substituted for the name of the natural parent (Public Health Law § 4138), the rights of intestate succession through the natural parent are terminated (DRL § 117), the child's surname is changed to that of the adoptive parent (DRL § 114), and the adoptive parent assumes full legal responsibility and authority for the child's care and support (DRL § 110). The displaced natural parent is effectively relegated to the status of a total stranger to the child. While as a natural parent, he is presumptively entitled to custody of his children as against a non-parent, absent a showing of extraordinary circumstances such as surrender,

abandonment, persisting neglect or unfitness, Bennett v. Jeffreys, 40 N.Y. 2d 543 (1976), adoption divests him of even the right to visitation,[12] and he is faced with the heavy burden of rebutting the new, adoptive parent's presumptive right to custody. Yet, as the facts of this case poignantly demonstrate, the effect of the permanent termination of the father's rights and obligations vis-a-vis children with whom he has a long-standing, durable and caring relationship are often no less tragic and traumatic for both parent and child than in the break-up of a more formalized family unit.

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12. In very rare cases, a natural parent has been granted visitation with the natural child after the child has been adopted, but only where the adoptive parent(s) have consented. See, Matter of Raana Beth, 78 Misc.2d 105 (Surr. Ct. N.Y. Co. 1974); Matter of Benjamin, N.Y.L.J. 4/4/78, p. 7 col. 2 (Surr. Ct. N.Y. Co.).

David and Denise Caban know and relate to their paternal relatives; they have spent a substantial amount of time with their paternal grandparents and are totally familiar with their background and heritage. Now, one-half their heritage, their extended family, is to be abruptly taken from them and artificially replaced with that of their step-father. The pattern of their childhood is to be totally altered. Their ability to see their father becomes dependent upon the opinion, or whim, of mother and step-father, and they lose any realistic opportunity to know and become a part of Mr. Caban's new family with his wife and her children. In cases such as this, adoption cannot completely destroy the connection between children and their background, and an attempt to do so may create confusion, feelings of rejection, and severe psychological trauma for the child. The gravity of the deprivation and

emotional turmoil imposed upon Mr. Caban himself cannot be overestimated. Despite the fact that he has shouldered far greater responsibilities for the care and supervision of his children than have many married, separated or divorced fathers, his familial bonds were afforded only the most cursory recognition in the adoption proceedings. While in the past he has been visiting David and Denise regularly, he can no longer see them; his chances of ever regaining their custody are realistically foreclosed; he must stand helplessly by as their names are changed and their links to their paternal family are totally erased.

B. The incremental benefits for the children and their mother of the children's adoption by the family which has their custody are not substantial, and their interests will not be significantly impaired by the capacity of the unwed father to block the adoption.

As this case illustrates, the positive implications of adoption for the children and their mother are minimal when compared

to the drastic consequences for the objecting natural father. Allowing the unwed father to block an adoption will not shift the focus of decisions concerning concrete issues of child-rearing away from the children's welfare, but will simply make it possible for a concerned and caring father such as Mr. Caban to play a role in his children's future.

If Mr. Caban were able to avoid the adoption of his children by withholding his consent, no practical changes in David's or Denise's living situation would necessarily come about, if their best interests would be served by maintaining current arrangements. The Caban children have now been living with their mother and stepfather for approximately 2 1/2 years; a veto of adoption would merely entitle Mr. Caban to attempt to obtain custody if it would be in the children's best

interests.[13] Nor would he be permitted to continue to exercise visitation rights with his children if it could be shown that visitation is unduly disruptive or upsetting to the children.[14] In short, the veto of adoption assures that such decisions are made in the children's best interests, not by fiat of mother and stepfather. It is true that after adoption

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13. In New York, neither parent has a presumptive right to custody of children in the event of a conflict; rather, "the Court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly." DRL § 70. This statute has been construed to afford equal standing to both parents of an out-of-wedlock child, and where the facts so indicate, custody will be awarded to the unwed father. See, e.g., Matter of Hilchuk v. Grossman, 57 A.D.2d 798 (1st Dept. 1977); Matter of Boatright v. Otero, 91 Misc.2d 653 (Fam. Ct. Onondaga Cty. 1977). As against a third party, however, an unwed father thus has a superior right to custody, in the absence of extraordinary circumstances warranting his displacement. See, e.g., Raysor v. Gabbey, 57 A.D.2d 437 (4th Dept. 1977).

14. (footnote on next page)

a step-father assumes the full support obligations of parenthood, but the appellee herein has been regularly supporting his step-children and obviously does not require the compulsion of a court order to continue to do so. The adoption order also enables the children to inherit through their step-father's family, but it does not appear that this right is more valuable than the right of inheritance through the Caban family which is lost by adoption. The adoption order therefore terminates Mr. Caban's obligations to provide support for the children,[15]

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14. New York courts have severely restricted or completely eliminated visitation between fathers and their children upon a showing of serious harm to the children caused by the visits. See, e.g., Petraglia v. Petraglia, 56 A.D.2d 923 (2d Dept. 1977); People ex rel Sanger v. Sanger, 55 A.D.2d 578 (1st Dept. 1976).

15. Family Court Act § 513 provides that: "Each parent of a child born out of wedlock is liable for the necessary support and edu-

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without appreciably changing the nature of their financial status vis-a-vis their step-father.[16]

Indeed, all that is to be gained by an adoption order in this case is the legal, formal acknowledgement of a relationship appellees contend already exists. The desire for such recognition is probably more keenly felt by appellees than by the children,[17] and any marginal interest

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cation of the child and for the child's funeral expenses." While the children's mother in this case has never sought support from Mr. Caban, she would remain free to do so if there were no adoption.

16. At any rate, a step-parent does have a qualified obligation of support, even in the absence of adoption. See, FCA §§ 415 & 455, which require a step-parent to support step-children under age 21 who are recipients of, or about to receive, public assistance.

17. The record does not indicate the desires of David and Denise were ever even considered by the court below as a relevant factor in its decision. It did not, for example, appoint a Guardian ad Litem to represent the children's interests. See, Surr. Ct. Procedures Act §§ 403 & 403-a. If it could be established

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they may have in the stability and security of an adoption contrasts sharply with the devastating impact upon Mr. Caban of losing all connections with his offspring.[18] Mr. Caban's veto would maintain a parity between himself and the children's mother respecting the right to seek custody and supervisory authority over the children. Thus, the custody proceeding which was pending in Family Court when the adoption petitions herein were filed would continue, and

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that the incidents of parenthood, such as a different surname from their mother, caused distress or anxiety for the children, even this could be changed without terminating parental rights. See, e.g., Matter of Williams, 86 Misc.2d 87 (Civ. Ct. Queens Cty. 1976).

18. Cf. Smith v. OFFER, 431 U.S. 816, 53 L.Ed.2d 14, 36-37 (1977).

it might well be decided in that forum that custody of the children should be awarded to their father. In any event, the determination would be based solely upon

> the children's health and well-being and the award therein could not be subsequently modified without a showing of changed circumstances, and the children's best interests.[19]

C. Statutory provisions for termination of parental rights and waiver of parental consent would prevent natural parents with no substantial interest in their children from preventing appropriate adoptions.

Affording unwed fathers the same power to block adoptions of their children available to all other parents will not hinder adoption in those cases where the natural father's ties to and interest in his children are highly attenuated,

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19. See, e.g., Matter of Ebert v. Ebert, 38 N.Y.2d 700 (1976); Matter of "CC" v. "CC", 37 A.D.2d 657 (3rd Dept. 1971).

since the legislature has anticipated those situations by allowing parental rights to be terminated and consent waived upon a showing of abandonment or unfitness. Given the liberal construction the New York courts have accorded to the definitions of "abandonment,"[20] "permanent neglect,"[21] and other grounds for disqualifying a parent from the veto right,[22] it is highly unlikely that any parent without long-standing and deep attachments to his children will be permitted to block their adoption. These provisions, currently applicable to all other parents, married or unmarried, male or female, effectively address most, if not all, the concerns voiced by the New York Court of Appeals, when it rejected a constitutional challenge to the statute here in question in Matter of Malpica-Orsini, 36 N.Y.2d 568 (1975), app. dismissed, sub nom, Orsini v. Blasi,

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20. "Abandonment" is defined as "failure for a period of 6 months to visit the child and communicate with the child or persons having legal custody of the child, although able to do so." DRL § 111(2)(a).

Prior to January 1, 1977, the statute did not contain a definition of abandonment, but the courts generally applied a test of whether the parent had evinced an intent to forego his or her parental rights and obligations. While early case law indicates the courts were extremely reluctant to find abandonment, the trend in recent years has been to construe "abandonment" liberally, consistent with a policy of freeing as many children as possible for adoption. Cf. Matter of Bistany, 239 N.Y. 19 (1924), with Matter of Anonymous, 40 N.Y.2d 96 (1976); Matter of Malik, 40 N.Y.2d 840 (1976); In re K.W.V., 92 Misc. 2d 292 (Sur. Ct. N.Y. Cty. 1977). Moreover, the legislature has consistently reacted to narrow interpretations of 'abandonment' by the courts by amending the statute to allow parental consent to adoption to be more easily dispensed with. For example, in response to cases refusing to find abandonment when even a 'flicker of interest' in the child by the parent remained, Susan W. v. Talbot G., 34 N.Y.2d 76 (1974), the legislature added a provision to the effect that evidence of infrequent or insubstantial contact by the parent with the child does not preclude a finding of abandonment. DRL § 111(6)(b), added by L. 1975 c. 704; L. 1976 c. 666. See generally, Final Report to the New York State Dept. of Social Services, Title IV-D, Research & Demonstration Project: Barriers to the Freeing of Children for Adoption,

March 1976 (Final Report), pp. 10-14.

21. See, e.g., Matter of Orlando F., 40 N.Y.2d 103 (1976);

22. These include: (1) deprivation of civil rights pursuant to the Civil Rights Law -- i.e., imprisonment; (2) mental illness or mental retardation; (3) a previous order terminating parental rights pursuant to Social Services Law § 384-b. DRL § 111 (2)(b)-(e). All of these were grounds for dispensing with parental consent to an adoption under the pre-1977 version of the statute, as well as 'habitual drunkenness' or 'judicially declared child abuse or neglect'.

The provision dispensing with consent of a parent who has been deprived of civil rights is currently under constitutional challenge in Thayer v. Donahoe (N.D.N.Y. 77 Civ. 380).

423 U.S. 1042 (1972). In Malpica, the majority of the court predicted that vesting a right of veto in unwed fathers would deprive homeless children of homes, create burden and expense in locating putative fathers, and lead to abuse of the consent requirement for personal revenge or financial gain. Malpica, supra, at 572-3. It is difficult to see how a truly malevolent, or irresponsible parent would be permitted to block adoption of his children under the New York system, since such a parent would undoubtedly be proved to have abandoned or neglected his children.[23] The

23. Two different methods are available to effectuate an adoption in New York. The adoption may be arranged through a child care and adoption agency, referred to as an "authorized agency." See, DRL §§ 112 & 113. Such "agency adoptions" generally involve children who have been either intentionally surrendered for adoption by a parent who cannot care for them (SSL § 384) or committed to the legal custody of the agency in a judicial proceeding pursuant to Social Services Law § 384-b,

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in which their parent's rights to them have been terminated because they have been abandoned or neglected, or because their parent is otherwise unfit to care for them. Adoptions which are arranged without the assistance of an authorized agency are known as "private placement adoptions." DRL § 109(5). While a private placement adoption may, like an agency adoption, provide a needy child with an entirely new set of unrelated parents, the vast majority are adoptions of children by the spouse of one of the natural parents, or by other relatives who had their custody.

Generally, the grounds for terminating parental rights prior to an agency adoption are identical to those for dispensing with parental consent to a private placement adoption, as set forth in DRL § 111. However, only an authorized agency or licensed foster parent may commence a proceeding to terminate parental rights, and the grounds of "permanent neglect," SSL § 384-b(4)(d), are not available to dispense with consent in a private placement adoption. For this reason, abandonment has been defined more broadly and is intended to be more easily established in the private placement context. See, Final Report, supra, at p. 45-46

The definitions of abandonment and unfitness justifying termination of parental rights and waiver of consent to adoption have recently been comprehensively re-drafted by the New York State Legislature for the express purpose of facilitating the freeing of more children for adoption. See, Final Report, supra, at pp. i-xviii

contention that the requirement of locating the unwed father and seeking his consent will discourage adoption has largely been mooted, since notice to putative fathers of an adoption proceeding has already been incorporated into DRL § 111-a. Finally, since, as described, infra, immediate issues concerning the children's daily surroundings and circumstances are in any event resolved with paramount emphasis upon their own best interests, a father who is unsuitable will not be permitted access to his children, even if his rights are not permanently severed by adoption.

That the forebodings of the court in Malpica were exaggerated is manifested by the posture of this case.[24] There was no difficulty in locating Mr. Caban, who

24. As indicated later in this brief, Malpica is fundamentally distinguishable from the instant case on the facts.

has been fully aware of and an active participant in all proceedings affecting his children from the outset. There has never been any doubt about his paternity.[25] Nor is there the slightest

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25. Despite a few indications of uncertainty in the testimony of Maria Mohammed, there is no real dispute that David and Denise are Mr. Caban's children, and the trial court assumed this to be a fact. In cases where paternity is disputed, a hearing would be necessary to determine whether, and to whom, the right to veto adoption attaches. Twenty-five states have anticipated and addressed this potential problem in that they require some showing of paternity -- i.e., formal acknowledgement, judicial declaration, proof of support or residence with the child -- before the right to grant or withhold consent to adoption is extended to an unmarried father. Ala. Code 26-10-3 (1958); Ariz. Rev. Stat. Ann. § 8-106 (Supp. 1976); Ark. Stat. Ann. § 56-106 (1971); Cal. Civ. Code § 224 (Supp. 1975); Colo. Rev. Stat. Ann. § 19-1-103 (1973); Conn. Gen. State Rev. § 45-61 (Supp. 1974); Del. Code Ann. Tit. 13, § 908 (Supp. 1974); D.C. Code Ency. 16-304 (Supp. 1976); Fla. Stat. Ann. § 63.081 (Supp. 1977); Ga. Code Ann. 74-103 (1973); Ind. Ann. Sta. 31-3-1-6 (Supp. 1977); Iowa Code Ann. § 600.17 (Supp. 1977); Ky. Rev. Stat. Ann. § 199.500 (1969); Minn. Stat. Ann. § 259.24 (Supp. 1974); Mont. Rev. Codes Ann. § 61-205 (Supp. 1975); Mich. Comp. Law Ann. § 710.28-39 (Supp. 1974);

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Nev. Rev. Stat. § 127.040 (1967); N.C. Gen. Stat. § 48-6 (Supp. 1977); Ohio Rev.Code Ann. § 3107.06 (Supp. 1977); R.I. Gen. Laws Ann. § 15-7-5 (Supp. 1977); S.C. Code Ann. § 15-45-70 (Supp. 1977); S.D. Compiled Laws Ann. § 25-6-4 (Supp. 1973); Utah Code Ann. § 78-30-4 (Supp. 1973); Va. Code Ann. § 63.1-225 (Supp. 1974); Wash. Rev. Code Ann. § 26.32.030 (Supp. 1975).

suggestion in the record that Mr. Caban's persistence in maintaining his parental relationships with his children is motivated by anything other than his devotion and love for them. In fact, he continues to seek their custody and has gone to the tremendous expense of purchasing a home for them to share as part of an ongoing family unit. That a father such as Mr. Caban could block the adoption of his children should not be a cause for alarm or regret, but rather, should be seen in the context of the entire child care system, as furthering its goal of encouraging and protecting positive, nurturing relationships between parent and child.

3. As Applied to the Facts of This Case, DRL § 111 Must Be Invalidated.

The constitutional infirmities of New York's adoption statute, as applied to deny unmarried fathers the same right to block their children's adoption as is afforded to all other parents, are compellingly manifested by the facts of the instant case. There can be no doubt that by permitting the adoption of David and Denise Caban to proceed over Mr. Caban's objections, the trial court impermissibly trammelled upon a father's substantial, constitutionally protected interest in his relationship with his children. Further, the extent and nature of Mr. Caban's involvement in his children's up-bringing belies the validity of the disparaging stereotypes concerning unwed fathers upon which their unequal treatment in the adoption process is premised.

On the basis of the record below, there could not possibly have been a

finding of abandonment or unfitness against Mr. Caban, as those terms are defined by statute;[26] the Court did not purport to make any such finding. Quite the contrary, the evidence adduced at trial clearly established that Mr. Caban had maintained continuous, active involvement in the care and supervision of his children from their births, and that his parental ties to them consisted of more than the mere fact of paternity. David and Denise Caban both lived with their father through the first, formative years of their lives. Even after their parents' separation, they never lost contact with their father who had weekend visits with them in the same way as would a divorced or separated father with

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26. See infra at p. 41 n 20 & 21.

an active interest in his children. When he became convinced that the children would be better off in his care than in Puerto Rico with their grandmother, Mr. Caban took them into his home and has ever since sought to maintain full legal and actual custody of the children. He is regularly employed, has a wife and step-children who are anxious to accept David and Denise into their family, and was not shown to be in any way unprepared to continue to fulfill all the obligations of parenthood. Thus, there is no question that Mr. Caban has a cognizable, substantial interest of basic constitutional dimension in the maintenance of his subsisting relationship to his children. As described earlier in this brief, the preservation of these ties would not in any way jeopardize the correspondingly strong interests of the children's mother, nor the best interests of the children.

There is simply no countervailing interest or public policy to be furthered by this adoption,[27] which justifies the drastic and irrevocable consequences imposed upon Mr. Caban.

While the court below accorded Mr. Caban's familial relationships only the most cursory acknowledgement, in contrast, the refusal of the children's mother to consent to Mr. and Mrs. Caban's cross-petitions for adoption was dispositive and those petitions were summarily dismissed. Both parents had maintained virtually indistinguishable relationships with their children, there was no finding that either had abandoned or neglected them, but, nonetheless, Mr. Caban's objections to the adoptions were overruled

27. The appellee step-father, of course, has no constitutionally protected interest in his step-children, and his concerns are amply protected by the rights of the children's mother.

and his parental rights terminated. Yet, if he had ever been married to Maria, the provisions of DRL § 111 would have precluded such a result, and Mr. Caban's status as David and Denise's father would have remained intact. It is difficult to see how this single change in Mr. Caban's legal status with respect to the children's mother would have made his relationship to David and Denise any stronger or more worthy of protection.

From all that can be discerned from the legislative history of the statute, the distinction made by DRL § 111 between married and unmarried fathers appears to be predicated upon an aversion to certain conduct considered immoral[28], or upon

28. Thus, the statute formerly stated that the consent to adoption was not required of a parent who had been divorced on grounds of adultery. This exclusion was eliminated by L.1974 c.842.

archaic, overbroad stereotypes concerning the behavior of unwed fathers, which are not supported in social science literature, empirical studies, statistical sources, or the facts of this case. These stereotypes portray every unwed father as an irresponsible man whose relationships with women are always casual and transitory and who inevitably abandons mother and child. From such a stereotype is derived the presumption that unwed fathers can never have close ties to their children, while unwed mothers and other fathers, including divorced and separated fathers, always do.

The literature indicates that most out-of-wedlock pregnancies result from exclusive, long-term relationships between mothers and fathers which are similar to the relationships of married or courting

couples in the general population.[29] The father of the child often wishes to marry, but the mother refuses.[30] Many fathers live with their illegitimate children.[31] Even fathers not living with their illegitimate children demonstrate genuine interest and concern for them, and assume the sociological functions of a parent, including the provision of financial and emotional support.[32] The invalidity of the presumption embodied in Section 111 that unwed fathers are less concerned with their children than are other fathers is illustrated by the juxtaposition of Mr. Caban's plight with the status of a divorced father who has had no contact whatsoever with his children. Regardless of the duration of the marriage, the amount of support provided, or indeed, whether the divorced father had even been made aware of the birth of a child, the child of such a father could not be adopted

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29. C. Bowerman, D. Irish, H. Pope, Unwed Motherhood: Personal and Social Consequences 97. Partial Report of Projects #006 and #189, Social Security Administration, Division of Research and Statistics, Institute for Research in Social Science, University of North Carolina, Chapel Hill, (1966), Unpublished (cited hereinafter as Bowerman, Irish & Pope), partially reported in Pope, "Unwed Mothers and Their Sex Partners," 29 Journal of Marriage and the Family 555, 558 (August, 1967), (cited hereinafter as Pope); Chaskel, "Un-Married Mother: Is She Different?" 46 Child Welfare 65, 72 (1967), (cited hereinafter as Chaskel); Herzog, "Some Notes About Unmarried Fathers," 45 Child Welfare 194 (April, 1966), (cited hereinafter as Herzog); Knight, "Conference for Pregnant Unwed Teenagers," 65 Journal of Nursing 126 (July, 1965), (cited hereinafter as Knight); New York Times, July 29, 1969, at 58, col. 1; M. Sauber and E. Rubinstein, Experiences Of The Unwed Mother As A Parent 27, Community Council of Greater New York (1965), (cited hereinafter as Sauber and Rubinstein), partially reported in Sauber, "The Role Of The Unmarried Father," 4 Welfare in Review 15, 16 (Nov. 1966), (cited hereinafter as Sauber).

Unwed parents constitute a cross-section of the population and represent all socio-economic class. Chaskel, supra, at 65. Unwed mothers and fathers generally have a similar education and socioeconomic status. Bowerman, Irish and Pope, supra, at 117, 120; Herzog, supra, at 194; R. Pannor. F. Massarik, B. Evans, The Unmarried Father 35 (1971), (cited hereinafter as Pannor, Massarik, and Evans); Pope, supra, at 560;

Vincent, "Unmarried Fathers," in Marriage and the Family in the Modern World 294, 297 (R. Cavan, ed., 1969), (cited hereinafter as Vincent); Wessel, "A Physician Looks At Services for Unmarried Parents," 49 Social Casework 11, 12 (1968), (cited hereinafter as Wessel). Age differentials between unwed mothers and fathers approximate husband and wife age differentials in the general population. Bowerman, Irish and Pope, supra, at 108, 120; P. Ewer, Final Report, HSMHA, Maternal and Child Health Care Service, Project H-214-2, Characteristics of AAPP Unwed Fathers - A Descriptive Study 13 (1971), (cited hereinafter as Ewer), (unpublished, obtained Division of Research, Maternal and Child Health Service, HSMHA, 5600 Fishers Lane, Room 12A-11, Rockville, Md. 20852); Pannor, Massarick and Evans, supra, at 560; Vincent, supra at 297. The unwed fathers generally live in the same locality as the mothers and have mutual associates with the mothers (Bowerman, Irish and Pope, supra, at 557), and are well acquainted with the mothers' families and peers. Bowerman, Irish and Pope, supra at 94; Pope, supra, at 557. Most unwed couples meet through friends or relatives or at school or work. Sauber and Rubinstein, supra, at 26; Sauber, supra, at 16.

Most unwed parents had been involved in exclusive, long-term relationships, Herzog, supra at 195; R. Roberts, The Unwed Mother, 228 (1970); Sauber, supra at 16; Sauber and Rubinstein, supra, at 26; during which time they were, or thought they were, "in love," Pope, supra at 560. The amount of concurrent, as well as serial promiscuity of the unwed parents was limited. Pope, supra at 562.

Finally, premarital sex in this society is not confined to unwed parents, but rather is prevalent in the general population. See Hunt, Sexual Behavior In The 1970's (1974) (reporting that 97% of males and 2/3 of females had premarital sex by age 25); Kinsey, Pomeroy, Martin and Gebhard, Sexual Behavior in the Human Female 286 (1953); Kinsey, Pomeroy, and Martin, Sexual Behavior In the Human Male 249 (1948); Vener and Stewart, "Adolescent Sexual Behavior In Middle America Revisited: 1970-1973," 36 Journal of Marriage and the Family 728 (1974).

30. Bowerman, Irish and Pope, supra, 131, 140; Herzog, supra, note 1, 194, 195; Knight, supra, 126.

31. An analysis of the 1960 and 1970 census figures indicates an increased proportion of families with own children under eighteen, headed by single male. U.S. Bureau of the Census, U.S. Census of the Population 1960 -- Vol. 1, Characteristics of the Population, Part 1 U.S. Summary, U.S. Government Printing Office, Washington D.C., 1964, Table 185; U.S. Bureau of the Census, U.S. Census of the Population 1970 -- Vol. 1, Characteristics of the Population, Part I, U.S. Summary - Section 2, U.S. Government Printing Office, Washington, D.C. 1973, Table 206. "Single parent" is defined as one who has never married and is not widowed, divorced or separated. U.S. Bureau of the Census, U.S. Census of the Population, Part I, U.S. Summary - Section 2, Appendix B, pp. App.-22. "Own child under eighteen" is defined as a never married son or daughter, by blood or adoption, Id., Appendix B. at 25. These figures indicate that in 1970, 14.3% of families headed by a single parent with own children under eighteen were

headed by male single parents, as compared to 11.8% in 1960, a 31.7% increase. Correspondingly, more children under eighteen living with single parents lived with their single fathers -- 13.9% in 1970, as opposed to 9.2% in 1960 -- a 37.5% increase.

Furthermore, the underlying statutory presumption that divorced and separated fathers always maintain close ties with their children (as opposed to the "absentee" illegitimate father) is rebutted by the census data. In 1970, only 8.8% of the children in divorced families and only 5.9% of the children in separated families lived with their fathers, as opposed to 13.9% of the children in single parent families. Correspondingly, 10% of the divorced families with own children and 7.4% of the separated families with own children as compared to 14.3% of the single families with own children, were headed by fathers.

32. Chaskel, "Changing Patterns In Services For Unmarried Parents," 49 Social Casework 3, 10 (1968); Ewer, supra, note 1, at 2 and Table 33 (between 59% and 83% of fathers of illegitimate children contributed money for their children's expenses and between 69% and 74% of fathers not living with their illegitimate children visited them); Knight, supra, note 1, at 126; Platts, "Agency's Approach to Natural Fathers," 47 Child Welfare 533, 537; Sauber, "Life Situations of Mothers Whose First Child Was Born Out Of Wedlock: A Follow-up After Six Years," Illegitimacy, Changing Services for Changing Times (1970), 40, 44, 45; Sauber, supra, note 1, at 17.

without the father's consent, unless the petitioning party met the burden of establishing a basis for dispensing with consent on one of the statutory grounds. But, despite the fact that he has borne far greater responsibilities for the care and supervision of his children than have many married, divorced, or separated fathers, Mr. Caban's ability to protect his familial ties against unwarranted termination is restricted, based solely upon presumptions about the competence of unwed fathers which disdain "present realities in deference to past formalities." Stanley, supra, at 657-58.

Nor is there any basis for according the children's mother any greater protection or deference as a parent than their father. Children form equally strong bonds with their fathers as with their mothers and paternal deprivation has a profound psychological effect on the child's self-concept, academic

achievement, and intellectual and moral development.[33] Both parents in this case shared joint custody of the children for approximately five years and each has subsequently had separate custody for relatively brief periods of time. There is nothing in the record to indicate that the children feel any less attachment to one or the other of their parents, yet solely because he is male, Mr. Caban can be supplanted as the children's father by their mother's new husband, who knew the children only a year when he was permitted to adopt them. Maria Mohammed, by consenting to this adoption and refusing consent to Mr. Caban's cross-petitions, is granted virtually complete authority over the future living circumstances and legal status of David and Denise, apparently on the basis of traditional, outworn notions of superior maternal capacity in the area of child care and custody.

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33. H. Biller, Father, Child and Sex Role (1971); H. Biller, Paternal Deprivation (1974) Kotelchuck, Zelazo, Kagan, and Spelke, "Infant Reaction to Parental Separations When Left With Familiar and Unfamiliar Adults," 126 The Journal of Genetic Psychology 255 (June, 1975); M. Lamb, "The Development of Mother-Infant and Father-Infant Attachments in the Second Year of Life," 13 Developmental Psychology 637 (1977); M. Lamb, "Father-Infant and Mother-Infant Interaction in the First Year of Life," 48 Child Development 168 (1976); M. Lamb, The Role of the Father in Child Development (1976); D. Lynn, The Father: His Role in Child Development (1974); Ross, Kagan, and Zelazo, "Separation Protest in Infants in Home and Laboratory," 11 Developmental Psychology 256 (1975); Spelke, Zelazo, Kagan and Kotelchuck, "Father Interaction and Separation Protest," 9 Developmental Psychology 83 (1973).

This Court should not hesitate to reject a procedure manifesting such blatant disregard of the principles of due process and equal protection as is presented here. Orsini v. Blasi, 423 U.S. 1042 (1976), in which this Court dismissed the appeal of an earlier case involving a challenge to DRL § 111, and Quilloin v. Walcott, U.S. ___, 54 L.Ed.2d 511 (1978), in which it upheld the Georgia adoption statute's disparate treatment of unwed fathers, are readily distinguishable from the case at bar. In Orsini, the record on appeal consisted of a skeletal stipulation of facts in which it was agreed that the overall best interest of the children would be served by their adoption and which contained no facts concerning the extent or nature of the father's past or present relationship to his children. Thus, the Court was not presented with a record like this one, in which the interests of the unwed father and his

offspring in their familial, blood ties are clearly of constitutional dimension. Similarly, in Quilloin, the unwed father's interest in his children was far more attenuated than Mr. Caban's. The Court emphasized that Mr. Quilloin, who sought to veto the adoption of his son, had never lived with him, nor sought his custody, and thus, "had never shouldered any significant responsibility with respect to the daily supervision, education, protection or care of the child." Quilloin, supra, 54 L.Ed.2d at 520. In contrast, the adoptive father had known the child and maintained actual, physical custody of him, together with his mother, for a period of six years. Id. Additionally, it should be noted that the Georgia adoption statute provides at least some vehicle for an unwed father to gain rights in adoption proceedings equal to those of other parents

i.e., he can 'legitimate' the children, thereby acquiring the right to veto any adoption unless shown to be unfit. No such possibility is afforded to unwed fathers in New York State.[34] By carefully limiting its holding in Quilloin to the facts of the case before it, the Court did not address itself to the constitutional requirements mandated in a case such as this, where the natural father has "borne full responsibility for the rearing of his children" during the five-year period he resided together with them and their mother, and where the adoptive step-father has only maintained physical custody of the children with their mother during two brief periods of a few months at a time.

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34. See note, supra, at p. 45.

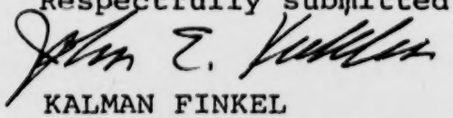
CONCLUSION

New York Domestic Relations Law Section 111, as applied to deny unwed fathers with substantial ties to their children the protections against unwarranted severance of their parental rights extended to all other parents, works an extreme and irrevocable deprivation which cannot be reconciled with either the due process or equal protection principles firmly established by this Court. By invalidating the challenged statute, this Court will restore the appropriate constitutional balance among the interests of parents, non-parents and children which otherwise prevails throughout the New York child care system. Therefore, it is respectfully

submitted that this Court should declare DRL § 111 unconstitutional as applied to appellant herein, and reverse the order of the New York Court of Appeals which is appealed from.

Dated: New York, New York
June 27, 1978

Respectfully submitted,



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* Attorneys for Amicus gratefully acknowledge the contribution made to this brief by Nancy Garber, a second-year law student at Benjamin J. Cardozo School of Law.

APPENDIX

Notice in certain proceedings to fathers of children born out-of-wedlock.

1. Notwithstanding any inconsistent provisions of this or any other law, and in addition to the notice requirements of any law pertaining to persons others than those specified in subdivision two of this section, notice as provided herein shall be given to the persons specified in subdivision two of this section of any adoption proceeding initiated pursuant to this article or of any proceeding initiated pursuant to section one hundred fifteen-b relating to the revocation of an adoption consent, when such proceeding involves a child born out-of-wedlock provided, however, that such notice shall not be required to be given to any person who previously has been given notice of any proceeding involving the child, pursuant to section three hundred eighty-four-c of the social services law, and provided further that notice in an adoption proceeding, pursuant to this section shall not be required to be given to any person who has previously received notice of any proceeding pursuant to section one hundred fifteen-b.

In addition to such other requirements as may be applicable to the petition in any proceeding in which notice must be given pursuant to this section, the petition shall set forth the names and last known addresses of all persons required to be given notice of the proceeding, pursuant to this section, and there shall be shown by the petition or by affidavit or other proof satisfactory to the court that there are no persons other than those set forth in the petition who are entitled to notice.

2. Persons entitled to notice, pursuant to subdivision one of this section, shall include:

(a) any person adjudicated by a court in this state to be the father of the child;

(b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, purusant to section three hundred seventy-two-c of the social services law;

(c) any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to section three hundred seventy-two-c of the social services law;

(d) any person who is recorded on the child's birth certificate as the child's father;

(e) any person who is openly living with the child and the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father;

(f) any person who has been identified as the child's father by the mother in written, sworn statement; and

(g) any person who was married to the child's mother within six months subsequent to the birth of the child and prior to the execution of a surrender instrument or the initiation of a proceeding pursuant to section three hundred eighty-four-b of the social services law.

(3) The sole purpose of notice under this section shall be to enable the person served pursuant to subdivision two to present evidence to the court relevant to the best interest of the child. DRL § 111-a